



Hogan  
Lovells

# Steering the Course

Navigating **third party** bribery  
and corruption risk

A global study by Hogan Lovells



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“The vast majority of the top ten Foreign Corrupt Practices Act enforcement actions in the U.S. have involved bribery by a third party.”

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# The threat of third party risks is real



Crispin Rapinet, Global Head of Investigations, White Collar and Fraud

Using third parties is one of the biggest bribery and corruption risks facing compliance teams today. As companies continue to increase their use of third parties year on year, regulators and enforcement agencies have sharpened their focus on the duties of corporations to prevent bribery and corruption by their third parties. In fact, the vast majority of the top ten Foreign Corrupt Practices Act enforcement actions in the U.S. have involved bribery by a third party.<sup>1</sup>

This is the second in our series of reports into bribery and corruption trends arising from our interviews with over 600 chief compliance officers, heads of legal and equivalent at the world's largest organizations with revenues of more than US\$350 million. We look at how common the use of third parties is across four key sectors – energy, minerals and resources; life sciences and healthcare; transport (including automotive and aviation); and technology, media and telecommunications – and how companies are managing this challenge.

This report explores how companies are managing third party risk, what best practice looks like, and how you can strike the right balance in dealing with third parties.

So who are these third parties? They include agents, intermediaries, fixers – in fact any service provider or supplier who is external to the company but who has a contractual relationship with it. This is potentially a wide group but the important ones to watch are those who act on behalf of your company – for example those who are negotiating your next contract.

Of course, as your company expands overseas, there are good reasons to engage third parties – local know-how, connections to potential customers, and familiarity with bureaucratic hurdles. It's a fine line to balance the commercial advantages against the risk that third parties pose to your organization when they are acting in your name. Yet if you don't have the right checks in place your company can be held liable if your third party bribes for your benefit. You then face the possibility of enforcement actions (including criminal exposure for individuals and the company) and reputational damage.

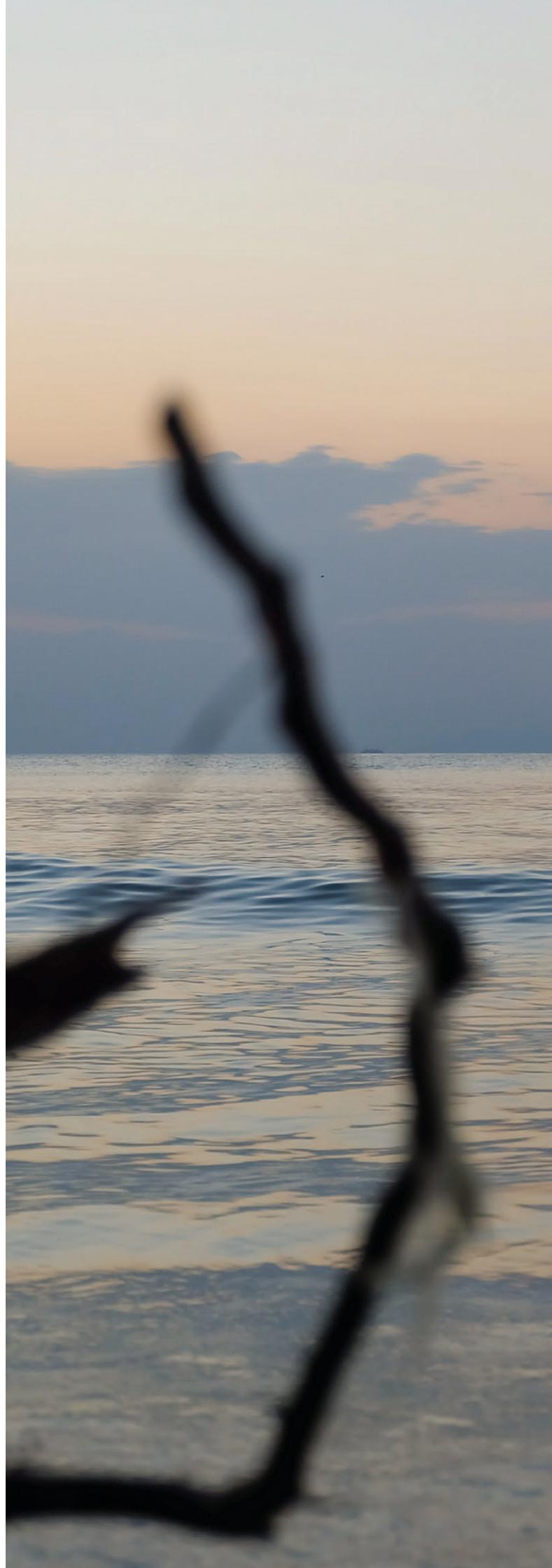
We saw the reality of this in August 2016, when the UK Serious Fraud Office (SFO) launched a corruption inquiry into the civil aviation business of a global aerospace and defense group. The company declared it would cooperate and admitted discrepancies in documentation on its use of third party intermediaries during jet sale negotiations.

One thing is clear – the use of third parties is on the rise, with 82% of respondents to our survey noting an increase in the last three years and 78% anticipating a further increase in the coming year. Yet many companies still aren't doing enough to mitigate the bribery and corruption risks that come with this. We hope to help you navigate them.

#### <sup>1</sup>Top ten FCPA enforcement actions of all time:

1. Siemens (Germany): \$800 million in 2008.
2. Alstom (France): \$772 million in 2014.
3. KBR / Halliburton (USA): \$579 million in 2009.
4. Och-Ziff Capital Management Group LLC (USA): \$412m in 2016
5. BAE (UK): \$400 million in 2010.
6. Total SA (France): \$398 million in 2013.
7. VimpelCom (Holland): \$397.6 million in 2016.
8. Alcoa (U.S.): \$384 million in 2014.
9. Snamprogetti Netherlands B.V. / ENI S.p.A(Holland/Italy): \$365 million in 2010.
10. Technip SA (France): \$338 million in 2010.

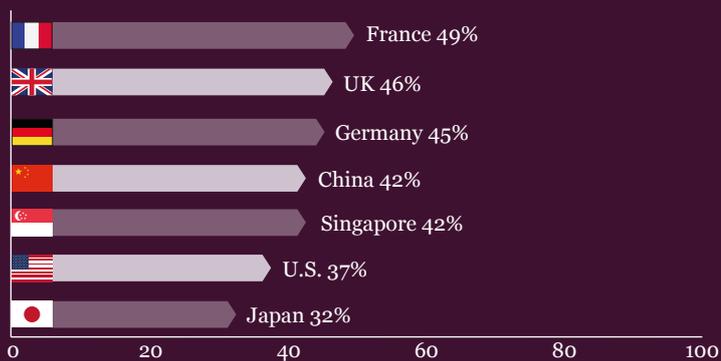
*Source: [www.fcpablog.com](http://www.fcpablog.com)*





## Record keeping

42% of companies are failing to keep a record of all third parties



Our clients tell us that due to the sheer number of third parties appointed across the business they struggle to find out who they are let alone keep a record and carry out a risk assessment or due diligence. And yet if a prosecutor or regulator ever came knocking one of the first things they will ask for is a list of third parties.

## Increased exposure

The use of third parties is on the rise. Major companies keen to expand around the globe often engage people who are more familiar with local business environments. In more mature markets, trends such as outsourcing, driven by cost pressures, lead to the use of more third parties.

These third parties connect companies to suppliers and customers, and offer insights into domestic bureaucratic regimes. In some countries it is the only way to do business legally. This is particularly prominent in energy, automotive, telecommunications, media and technology (TMT), and pharmaceutical companies who are using third parties such as consultants, agents, and joint venture partners.

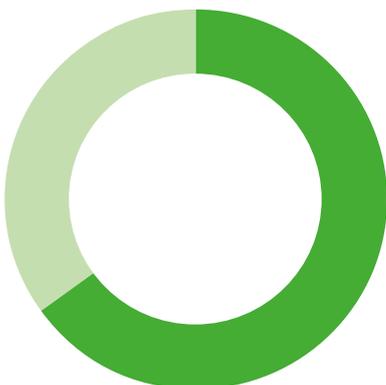
Of the 604 respondents to our survey, 82% reported a rise in the number of third parties they used globally over the last three years and only 7% report a fall. This trend shows no sign of abating – 78% of respondents anticipate a further increase in the next 12 months.

This is even more significant in the U.S. and China where 91% of respondents report an uptick in their use of third parties and most predict that use will increase further in the next year (88% in China and 87% of respondents in the U.S.).

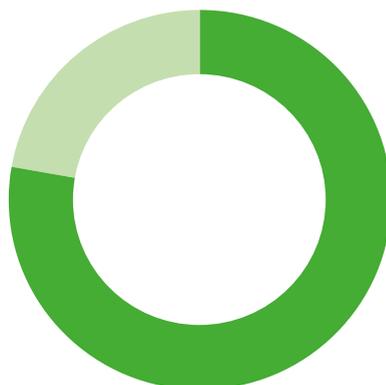
The use of third parties is particularly prevalent in the TMT sector. 85% reported an increase in use and, of those, 82% expect the numbers to go up next year. Of the four sectors surveyed, transport reported the lowest increase; nonetheless 77% have increased their use of third parties in the past three years and 75% expect a further increase next year.

This growth in the use of third parties brings with it an increased bribery risk. The high-growth markets in which third parties are increasingly employed are often in new territories with higher levels of corruption and unfamiliar business practices, while greater distances from head office also exacerbate the risk.

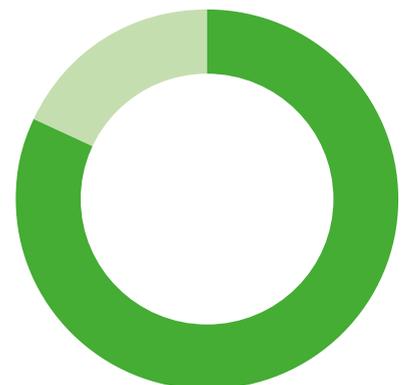
It is hard to know whether third parties in remote jurisdictions, working to different rules, are towing the line. It is also costly to police their activities when corporate finances are under pressure.



**65%** of respondents to our survey cite the use of third parties as one of their biggest challenges.



**78%** anticipate a further increase in the coming year.



**82%** say their use of third parties has increased in the last three years.

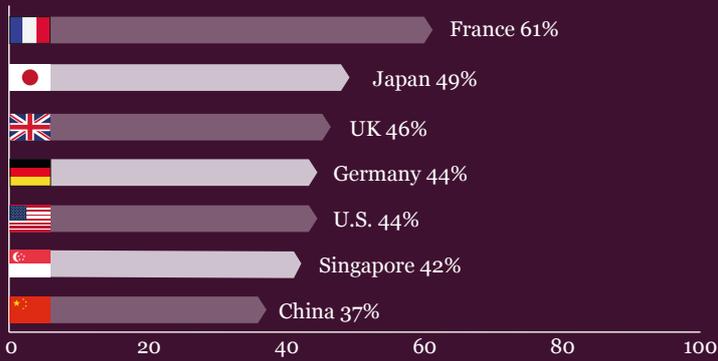
Respondents to our survey are aware of the risks that third parties could present if not closely monitored. Overall, whereas 29% of respondents point to government officials as the biggest single risk of bribery and corruption, one in four (25%) believes the biggest single risk comes from third parties. Business advisers are at the top of the bribery and corruption risk list for a further 18% of respondents, and 9% have singled out client entertainment and gifting instead. Interestingly, half of respondents (51%) say that their team has rejected a third party on the grounds of anti-bribery and corruption risk. This suggests that some monitoring is clearly happening, although this report will show that it is still not at the level it should be.





## Due diligence

47% of companies are failing to perform desktop due diligence on third parties



Our clients tell us that they have not managed to put in place a sufficiently rigorous process for on-boarding third parties to ensure that this happens. Many struggle due to resource constraints. Even if desktop due diligence is carried out on only the riskier third parties then that would give materially greater protection.



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“Whilst there are some interesting jurisdictional variances in our survey results there is no doubt that the focus of regulators worldwide on third party due diligence is increasing all the time. For example, we see France performing badly on many basic measures of anti-bribery and corruption risk management, which may reflect the country’s historic lack of legislation in this area; but with new legislation in France that is about to change.”

*Antonin Lévy, Partner, Paris*

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## Prevent and protect

With this exponential rise in the use of third parties it is perhaps unsurprising that two-thirds (65%) of respondents stated that using third parties is one of their biggest challenges. As third parties are not an organization's own employees this clearly adds another layer of complication for companies when trying to ensure that they adhere to the same level of compliance.

The risk is greater where it is illegal for foreign corporations to transact without a local partner. Countries such as China and Brazil require foreign firms to take a local partner to enter their markets, which shifts the balance of power in a way that makes managing third party risks even more challenging.

Nonetheless, our research shows that companies are not doing enough to mitigate the risks, such as ensuring that they know the background of the third party they are contracting with or making sure adequate checks and controls are in place:

- 42% fail to keep a record of all third parties
- Nearly half (47%) don't carry out desktop due diligence
- Nearly half (46%) don't include anti-bribery and corruption clauses in their third party contracts

The law is clear on corporate exposure. The UK Bribery Act bans the payment of bribes through third parties, and Section 7 holds companies criminally liable for bribery intended to benefit them and carried out by people who perform services on their behalf. Likewise, the U.S. Foreign Corrupt Practices Act bans corrupt payments made through third parties. The fact that a third party pays the bribe does nothing to reduce the potential for civil or criminal liability, and prosecutors have ever increasing demands and expectations regarding adequate procedures, including what procedures are in place for third parties. Once it was sufficient to have written policies in place - that is no longer the case. In some cases

the prosecutor will examine whether there should have been audit clauses in third party contracts and whether they have been triggered.

In addition the scope of third party bribery risk is broad. Transparency International points out that while companies may think some types of third parties fall outside the legislation, in fact there is no distinction between different types of third parties. Companies have been held liable for the actions of their distributors, shipping agents, business consultants, joint venture parties, and local partners. If companies want to increase their third parties, then they need to work harder to make sure they have procedures to mitigate the risk of wrongdoing.

Isabel Carvalho, Partner, São Paulo explains:

*“Imagine a situation where a third party contractor goes off in pursuit of a government contract, bribes an official, and the company headquarters knows nothing about it. Whereas historically that didn't present a great issue under Brazilian law, now a company is liable criminally for the actions not only of its employees but also of third parties, if those actions are for the benefit of the company, and whether or not it knows about them. The only way a company can have a defense in such a situation is by having adequate procedures in place, so that it can show it has done everything it can, bearing in mind the risk levels, to check out any third parties it hires, and to ensure they aren't likely to pay bribes on behalf of the company.”*

The reality of this is clear. In 2008 a leading industrial and consumer products manufacturer was hit with a record fine from the U.S. Securities and Exchange Commission. The case involved thousands of payments that third parties made to get business.

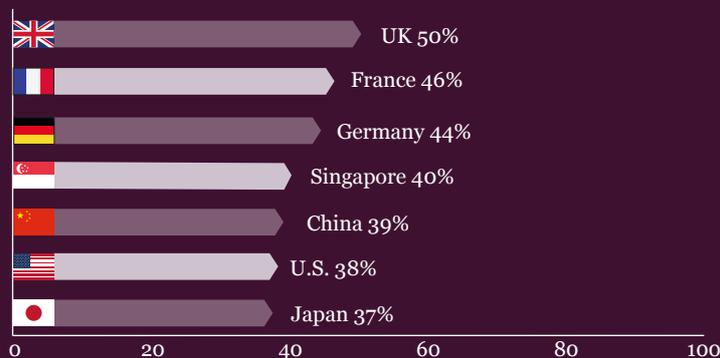
“The only way a company can have a defense is by having adequate procedures in place, so that it can show it has done everything it can.”

*Isabel Carvalho, Partner, São Paulo*



## Risk assessment

43% of respondents fail to regularly risk assess all third parties



Our clients tell us that business time pressures often get in the way; others simply miss out this step on the basis that they know the risks in their business. And yet this is another fundamental building block to evidence that a company has adequate procedures in place. It is vital that a proper risk assessment has been undertaken across the business and regularly updated. It also ensures better allocation of limited resources with the company focusing the majority of its compliance energies on the higher risk areas.



## Managing third party and intermediary relationships

So how are the companies we spoke to currently trying to manage this risk?

The big issue for companies faced with a growing roster of third parties appears to be working out what is sufficient, by way of adequate procedures, to provide a defense if they act improperly.

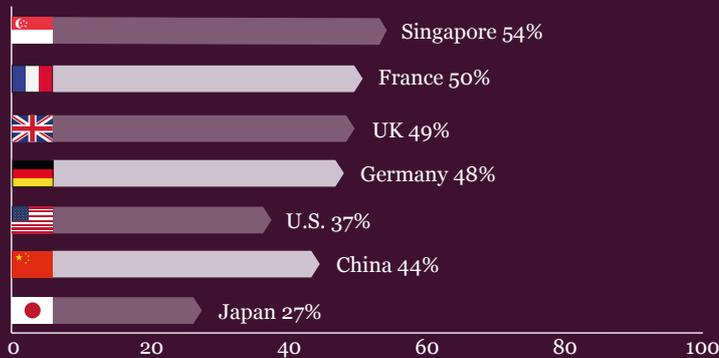
We asked our respondents which of 12 basic measures of control they have in place. Affirmative answers ranged between just 51% and 58% on each of the twelve measures, meaning several of these measures are being neglected by nearly half of respondents:

	Percentage who answered yes
We carry out desktop due diligence on third parties	53%
We send third parties a questionnaire to complete	56%
We undertake face to face interviews of third parties	56%
My team has rejected a third party on the grounds of AB&C risk	51%
We keep a record of all third parties	58%
There are AB&C (anti-bribery and corruption) clauses in all contracts with third parties	54%
We have audit clauses with all third parties	56%
My team has exercised its right to audit a third party	58%
My team has seen all of their AB&C programs	55%
All third parties undergo our AB&C training	52%
My team has access to and reads their whistleblowing reports	56%
We undertake regular risk assessments of all third parties	57%



## Questionnaires

44% fail to ask third parties to complete a questionnaire



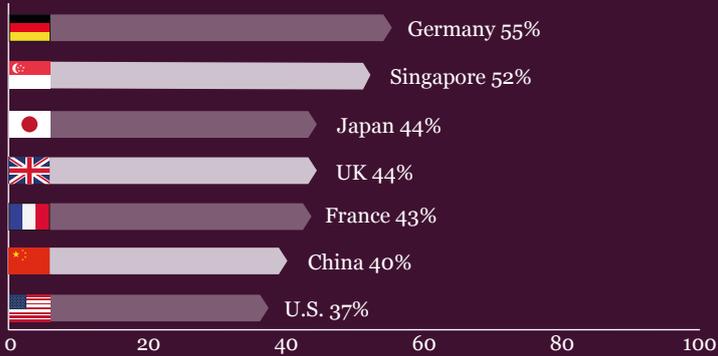
Our clients tell us that they are constrained by resources. If they send out questionnaires to all their third parties, who is going to chase for responses, review the responses when delivered and deal with any queries on the form or answers left blank? One approach is to start with just the higher risk third parties, and ensure that the questionnaire is framed in a way that is best going to give answers that are meaningful in assessing that third party. Often “less is more” in these cases.





## Face-to-face interviews

44% fail to undertake face-to-face interviews with third parties



Our clients tell us that the most effective means of assessing third parties is to see the “whites of their eyes” by way of a face-to-face meeting. Just a few well positioned questions can reveal very rapidly the true state of that third party’s compliance program. Do they really take anti-bribery compliance seriously? The challenge of course is that the riskier third parties are usually located a long way from head office. That means that the company must have a process whereby the higher-risk third parties are identified. One alternative that a number of clients are adopting is to use local expertise to undertake those interviews; they will have the linguistic skills and be able to challenge on known local practices that someone from outside that region may be unaware of.

## Third party audit rights

Another interesting area that many companies are considering is the use of third party audit rights, which may be included in contracts to allow businesses to check up on the third parties they work with. However, there is a wide variety of views on whether this is something that should be encouraged or not.

Eugene Chen, Partner, Shanghai, explains: “*There’s a debate about whether including audit rights in a contract is actually a good thing. The problem arises if you have audit rights in a contract and fail to exercise them. Then you are probably in a worse position when it comes to demonstrating adequate procedures are in place than if you don’t have the rights in the first place. If you do have them, you should exercise them regularly.*”

A quarter of respondents say they only trigger their third party audit rights once every two or three years or less. In the U.S., 85% of respondents trigger audit rights at least once a year, compared with 69% in Germany, 71% in the UK, and 73% in France. Overall, only 56% have audit clauses with all third parties.

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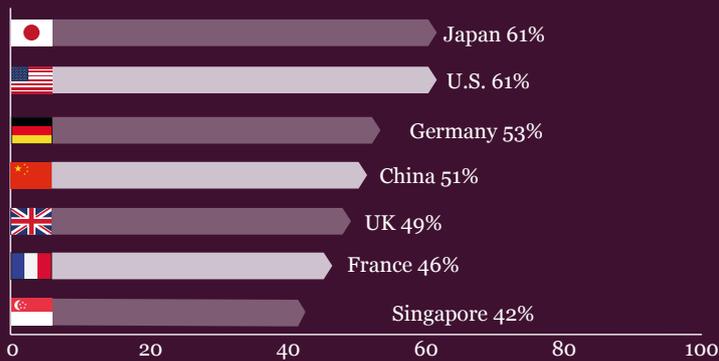
*Eugene Chen, Partner, Shanghai*

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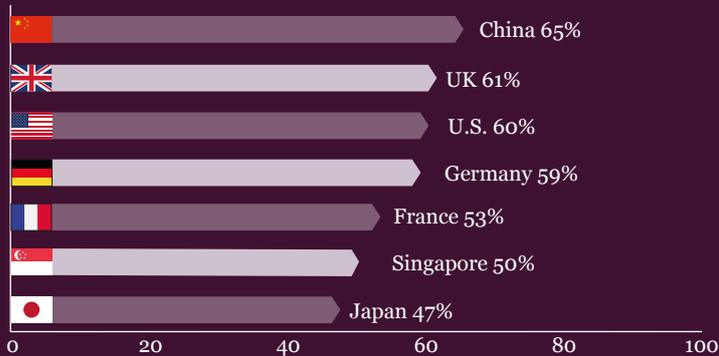


## Training

52% ensure third parties undertake training



58% ask third parties to refresh their training once or twice a year



Our clients tell us that they struggle to ensure that everyone within their own organization is trained let alone ensuring third parties are trained. And it takes time to chase down third parties to check out whether they have undertaken the training. One suggestion is to ensure that training is included as part of the contract with the third party with the onus on the third party to self-certify each year – then you only have to chase those that fail to self-certify.

## The way ahead

When we asked our respondents where they felt most exposed, 52% said that it was entering new markets where bribery and corruption is a risk. 50% pointed to the greater use of third parties, and 50% also to the pressure and incentives for workers, which push employees to pursue profit at any cost.

Greater use of third parties is considered the joint biggest risk by those in Singapore, where 65% identified it as a driver of risk (along with 65% identifying pressure and incentives for workers), with France following closely behind at 57%. China had the fewest respondents (37%) linking a greater use of third parties to an increase in the risk of bribery and corruption within their organizations going forward.

So what would companies most like to see changed for the future in order to address their concerns? 62% said that they were most likely to support an international code of best practice to reduce the risk of bribery and corruption. This was closely followed by collective action (60% in support); while just over half of respondents (54%) believe removing the legal requirement to work through a local third party in some countries would make an impact – with support for this highest in Japan (63%), the U.S. (62%), and China (60%).

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“The call for an international code of best practice is one we are increasingly hearing from clients. However, such a code may offer little protection unless supported by regulatory approval, which is unlikely to be forthcoming.”

*Tim Wybitul, Partner, Frankfurt*

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# The ABC of AB&C

Hogan Lovells recently produced its own benchmarking model, “The ABC of AB&C” (anti-bribery and corruption), to help companies comply with anti-bribery and corruption legislation around the world. The tool is not all encompassing, and the needs of each organization will vary considerably, but it does provide a useful guide to general standards. When it comes to dealing with third parties, our tool describes an advanced compliance program as one where:

- Senior management monitors the third party due diligence process, periodically reviews its suitability, adequacy and effectiveness, and implements improvements.
- The level of due diligence on third parties is adjusted to reflect the risk posed by the third party, taking into account :
  - the prevalence of corruption in the **jurisdiction(s)** in which the third party is operating;
  - the prevalence of corruption in the **industry** in which the third party is operating;
  - the extent to which the third party will interact with **government officials**; and
  - the **financial incentives** the third party may have to pay bribes, e.g. the potential for greater commission depending on sales targets.
- Third parties that pose a high risk are thoroughly scrutinized using a combination of:
  - open-source and desktop due diligence;
  - interviews with the third party’s management;
  - third party references;
  - TRACE certification (or equivalent); and
  - verification through an external provider.
- Contractual protections are used, to include (where appropriate):
  - requirement on third party to maintain its own anti-corruption compliance program;
  - termination/suspension rights in the event the third party is investigated or prosecuted for bribery;
  - audit rights; and/or
  - periodic self-certification.
- The third party’s anti-corruption compliance program (code of conduct etc.) is subjected to a “health check” to ensure it has the capacity to counter corruption.

You can access our benchmarking tool and other useful information on [hoganlovellsabc.com](http://hoganlovellsabc.com)



## Sector insights

### Life sciences and healthcare



**Gejaa Gobena,**  
Partner, Washington, D.C.



**Désirée Maier,**  
Senior Associate, Munich

It's no surprise that life sciences respondents increased their use of third parties in the past three years more than other sectors (10% of life sciences respondents said they have taken on more than thirty new third parties, compared with 7% in transport, 6% in TMT, and 5% in energy), and they expect this to continue next year. The global life sciences industry is complex and highly regulated, and regulatory regimes evolve fast.

Countries with established healthcare systems have complex regulatory systems that are difficult to navigate and ever changing, while it's often challenging to access and navigate newly established healthcare systems in countries that are developing them. So there's a growing need for local expertise beyond the existing capabilities of many life sciences companies.

It is not unusual for life sciences companies to use third parties to supplement their own capabilities, especially in countries where they have a limited presence. Many of these countries are in emerging markets, which can raise the risk of potential bribery and corruption. While life sciences companies will insist on strict compliance with anti-bribery and corruption laws, their ability to control the actions of individuals ostensibly acting on their behalf becomes more challenging as third parties get involved.

The life sciences sector has strengthened its third party compliance processes in recent years, especially those that relate to distributors and healthcare professionals. At the same time, there are other third party relationships that need enhanced compliance efforts as well. Such is the case of third parties used for events – from the large event organizer to the driver service – charity organizations, and clinical research organizations.

Given how regulated and competitive the industry is, anti-bribery and corruption enforcement in the sector is on the rise in most countries. So, as an industry, life sciences companies face significant risks worldwide. German bribery and corruption authorities have increased their focus on the life sciences industry, including passing a new law on bribery in the healthcare sector.

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**“It is not unusual for life sciences companies to use third parties to supplement their own capabilities, especially in countries where they have a limited presence.”**

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No third party due diligence process can cover all activities in all markets. We recommend you set up structured and defined third party due diligence processes, tailored to both the risks in your sector and the activities in country you wish to enter. It is not unusual for companies to set up processes that do not work in a particular country – or do not avoid the bribery and corruption risks – and that therefore have to be stopped. To avoid this, you must invest enough time and effort when you design your due diligence process.

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**“Charities and clinical research organizations can pose especially significant bribery and corruption risks because they may handle funds on behalf of a life sciences company.”**

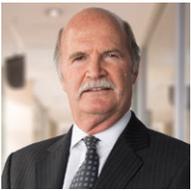
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## Energy, minerals and resources



**Maria Boyce,**  
Partner, Houston



**Tony Canny,**  
Partner, Johannesburg

Respondents in the energy sector are increasing their use of third parties despite this increasing their exposure to risk. This is no doubt linked to a reduced internal headcount within energy companies and the perception that savings will result from outsourcing these duties.

The economics are so difficult for some in the industry that the concern about risks arising from these arrangements is not of as much concern as staying financially viable in the middle of a severe downturn.

The greatest risk to businesses in the energy sector is seen to be government officials followed by the use of third parties. This is because it is only the government officials who have the power to cease or reduce the scope of operations, which results in an immediate diminution of revenue for the business. In contrast, third parties (which also have an interest in the continuation of operations) can usually be negotiated with to reach a viable resolution.

The sector generally deals well with third party relationships. However, there is always a risk that cost-cutting may result in less due diligence. The biggest exposure lies in cutbacks in the compliance area.

Although there are risks globally with third party relationships, West Africa in particular presents an AB&C risk for energy firms. West Africa has been, and will continue to be, a difficult place for energy companies to function.

We recommend heads of risk in the energy sector focus on their AB&C risk and the high standards imposed by both international and domestic legislation as a serious issue. Firms should invest in extensive and continual due diligence of all third parties to mitigate this risk.

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**“The economics are so difficult for some in the energy industry that the concern about risks arising from these arrangements is not of as much concern as staying financially viable in the middle of a severe downturn.”**

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companies to function.”

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## Transport



**Sebastian Lach,**  
Partner, Munich



**Jim McGovern,**  
Partner, New York

We see signs that transport businesses are reassessing their need for third parties because of the potential compliance risks they pose. There's a growing trend of companies taking back control of certain tasks themselves, or simply cutting the number of third parties working on parallel tasks.

So it's unsurprising that across the four sectors surveyed, transport is the one with the biggest fall in the use of third parties over the past three years – 23% say the number has dropped or stayed the same. Respondents in the sector predict the smallest increase going forward. This makes business partner compliance reviews easier and reduces associated risks.

Only 53% of transport respondents keep a record of all their third parties, and only 41% of those interviewed in the sector said that

they routinely carry out desktop due diligence, a figure that's way behind other sectors. It might be that the percentage of small and medium-sized companies is higher in the transport industries, and as such, investment in compliance programs may be smaller.

Nonetheless, we recommend you invest in establishing robust business-partner compliance systems, including regular audits.

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**“We see signs that transport businesses are reassessing their need for third parties because of the potential compliance risks they pose.”**

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## Technology, media and telecommunications



**Stephanie Yonekura,**  
Partner, Los Angeles



**Maurice Burke,**  
Partner, Singapore

TMT is a fast growing industry, and as it expands across the globe into developing markets, companies are forced to use third parties to navigate a specific country's regulatory, legal, and business systems. Respondents from TMT are increasing their use of third parties more than any other, even though it is increasing their exposure to risk.

The TMT sector identified third parties as their single biggest bribery and corruption risk. It is the only sector surveyed that placed third parties above government officials. Despite this, only 61% of TMT respondents keep a record of all their third parties, and only 57% put AB&C clauses in all contracts with third parties.

It may seem unusual that a sector which is ahead of the curve on many compliance areas has such low figures in this area. It usually takes several high-profile, multimillion-dollar cases for an industry to wake up and understand that it needs to be diligent in its anti-bribery and corruption efforts. For example, the life sciences sector is now well aware of the risk, given the numerous Foreign Corrupt Practices Act actions brought against pharmaceutical companies. Vimpelcom and its US\$795 million settlement may spur the TMT sector into action.

China, in particular, will continue to present anti-bribery and corruption risks for TMT firms. In 2016 the United States secured settlements with Akamai Technologies, Qualcomm, and PTC for activities in China. However, demonstrating its reach across the globe, the U.S. also secured settlements from Vimpelcom for activity in Uzbekistan and SAP SE for activity in Panama.

We recommend you focus on training and monitoring third party vendors. Companies need to be more educated about the bribery and corruption risks that they face. Countries across the globe are beginning to investigate corruption to show they can “clean their own house” and to extract the multimillion-dollar penalties that have become commonplace.

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**“China, in particular, will continue to present anti-bribery and corruption risks for TMT firms.”**

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## Research methodology

The study is based on independent opinion research designed and commissioned by Hogan Lovells in January 2016.

The research was conducted amongst 604 chief compliance officers, heads of legal or equivalent at 604 of the world's largest multinational companies.

Respondents were all from companies with a minimum of 2,000 employees and at least US\$350 million turnover, and had been with the company in that role for more than a year.

101 respondents were from the UK, 102 from Germany, 100 from France, 151 from the U.S. and 150 from Asia. Within Asia, 57 were from China, 52 from Singapore and 41 from Japan.

Focusing on high-risk sectors at the heart of global anti-bribery and corruption regulation and investigations, 124 respondents were in life sciences, 138 in energy, minerals and resources, 152 in transport, and 190 in technology, media and telecoms. The research was conducted by Coleman Parkes.

You can find our compliance guide, mini-assessment quiz and full report on [hoganlovellsabc.com](http://hoganlovellsabc.com)



## Our team

The Hogan Lovells Global Bribery and Corruption Task Force offers international clients informed advice in a number of areas of risk, from reactive incident response measures to the development of proactive strategies for managing potential exposure through compliance programs.

Our task force brings together a cross-jurisdictional team of partners from Hogan Lovells' international network with more than 25 years of experience in large-scale investigations. The task force has real experience on the ground in the U.S. and Europe (including the UK,

Germany, Spain, Italy, and France), as well as in Russia, Asia (including China, Hong Kong, Singapore, and Jakarta), Latin America, and Africa. Hogan Lovells is a recognized leader in investigations and fraud work, being ranked in the top tier of leading legal directories.

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“Hogan Lovells is among an exclusive group of firms that field top-level investigations specialists right across the globe. This is reflected in the quantity, quality and breadth of matters it handles. The firm has a truly impressive number of senior investigations lawyers within its ranks.”

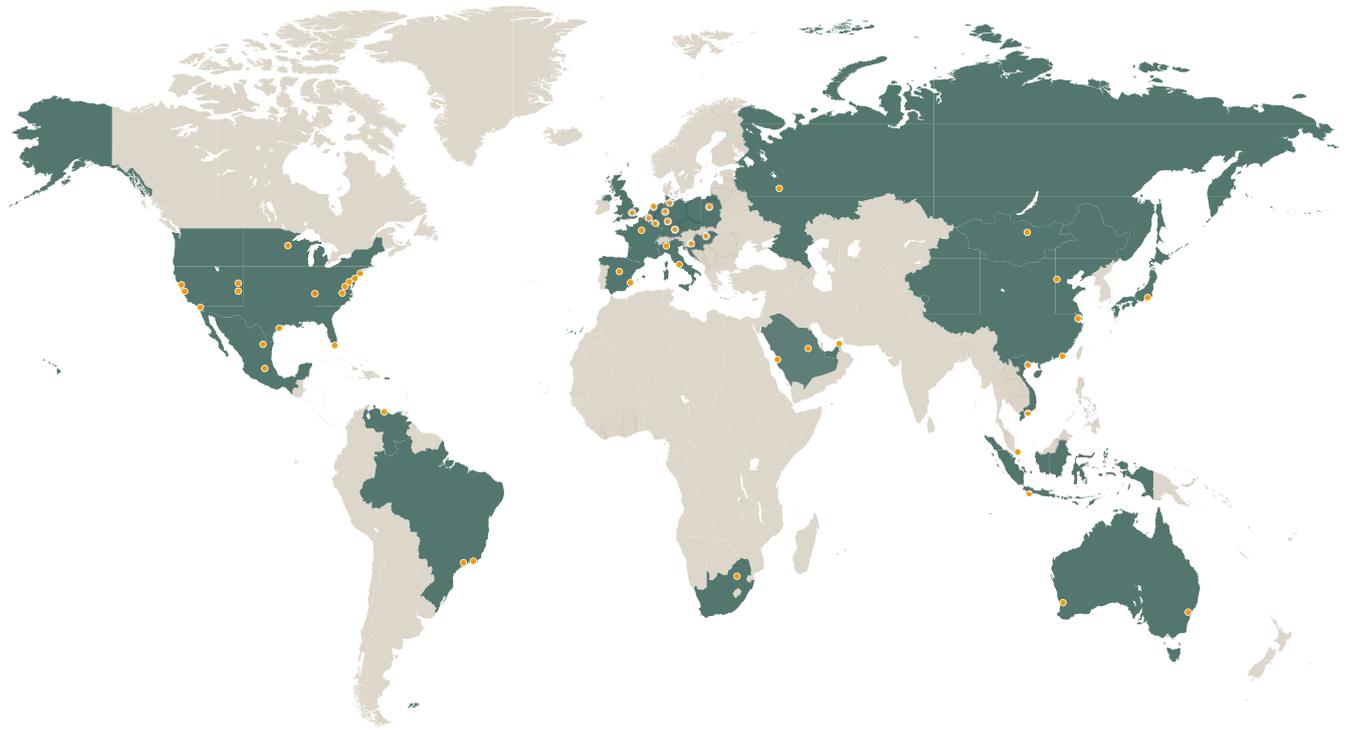
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